United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1388

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No: 74-1388

UNITED STATES OF AMERICA,

Appellee,

-against-

ARMANDO ALVAREZ, et al

Appellant

BRIEF OF APPELLANT

ARMANDO ALVAREZ

On Appeal from the
United States District
Court for the Southern
District of
New York

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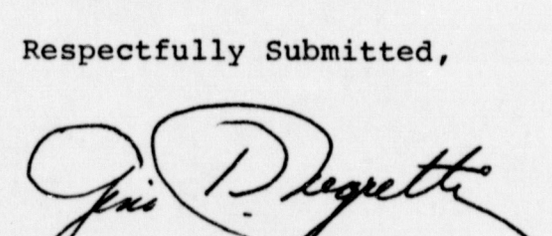
POINT

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 28(i) APPELLANT ALVAREZ RESPECTFULLY INCORPORATES BY REFERENCE ANY ARGUMENTS RAISED BY CO-COUNSEL INSOFAR AS THEY ARE APPLICABLE TO HIM.

CONCLUSION

FOR THE ABOVE REASONS, THE JUDGMENT APPEALED FROM SHOULD BE REVERSED.

Respectfully Submitted,



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UNITED STATES COURT OF APPEALS
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-against-	*	Docket No:
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Appellant.	*	

PRELIMINARY STATEMENT

Indictment 74 Cr. 18 charged Appellant with one count of conspiracy to import and distribute heroin (21 U.S.C. Section 173, 174) and with one count of purchasing six (6) kilograms of heroin in four different transactions. Appellant went to trial together with 12 other co-defendants on February 21, 1974, before Hon. Charles Metzner, District Judge, United States District Court, Southern District of New York, and on March 20, 1974, he was found guilty of both counts, and on April 22, 1974 he received two concurrent eight year prison terms.

On information and belief Appellant is presently free on bail pending appeal.

The numerical references to the pages, will be designated as (A...) and it will refer to the Appellants appendix.

STATEMENT OF THE CASE

In this multi-count, multi-defendant narcotics conspiracy trial, the prosecution intended to prove that there existed three levels at which the defendant functioned. First, there were the suppliers, (Hovsep, Caramian, Segundo Coronel, Roberto Arenas, and Manuel Noa), then came the distributors, the main one according to the government being Raul Ortega, for whom the two main government witnesses Ramiro Gonzalez and Miguel Rodriguez worked. Lastly there were the customers, or buyers, the appellant Armando Alvarez falling in this category.

The evidence against the appellant Armando Alvarez consisted of the seriously contradicted testimony of Ramiro Gonzalez and Miguel Rodriguez pertaining to him buying heroin from them on several ocassions.

Appellant contends that even if the testimony of the witnesses is to be believed, evidence of his purchases of heroin does not permit a reasonable inference that he had knowledge of, and participated in, the wide-ranging conspiracy charged in the indictment.

Appellant also contends that if in fact he was a participant in a conspiracy, this was a different conspiracy from the one charged in the indictment and that the Court's charge as to multiple conspiracy was not adequate and that this was a fatal variance from the indictment.

Further, the appellant contends, that the chart used by the prosecution in aid of it's opening statement was so prejudicial, that from inset of the trial, it deprived the defendant of a fair trial.

Appellant also contends that the contradictions in the testimony of the government's witnesses, deprived the defendant of a fair trial, as the government knew the testimony of the witnesses in advance and was in notice of such conflicts and the irreconcilable differences in their testimony were proper grounds to grant appellant's counsel Motion for directed verdict at the end of the governments case.

Lastly, the appellant contends that the Court erroneously and inadequately marshalled the evidence.

STATEMENT OF FACTS

Appellant and twelve other defendants were charged in indictment 74 Cr. 18, with conspiracy to import, distrubute heroin and with purchasing of six kilograms of heroin.

Trial Feb 21, 1974 - March 20, 1974

The trial opened over the objection of appellant's attorney to a certain chart which the United State's attorney intended to use in its opening statement, (A...1-5). From the very beginning the prosecutor characterized the appellant in its opening statement as a customer or buyer, not a distributor nor a supplier. (A...7).

Miguel Rodriguez, testified that on January 1971, he plead guilty to several counts of an indictment, charging him with conspiracy to distribute narcotic drugs and with the actual distribution of narcotic drugs, and in February 1971, was sentenced in the Southern District of New York, to ten years. (A...8-9).

In March 10, 1970, he met Ramiro Gonzalez (A...10) and accepted Gonzalez's request to help him find customers interested in buying 45 kilograms of heroin that Gonzalez had brought to New York from Florida, (A...11, 12) and that pursuant to said agreement he contacted

several persons, including the Appellant Armando Alvarez - El Chino. (A...13).

That there came a time when he received a message that the Appellant had arrived from Puerto Rico and that the appellant was trying to locate Ramiro Gonzalez. That a meeting was set up for him and Ramiro Gonzalez, to meet with the appellant at El Alamac Bar, where they met the appellant and Hugo El Mirna. (A...14). Subsequent thereto, Rodriguez testified that him and Ramiro González met with the Appellant at Prada's Gas Station and agreed to distribute to appellant on credit one kilogram of heroin. (A...16). That originally Rodriguez was to deliver said kilogram at Prada's Gas Station, but he could not be there on time, so he met the appellant at 11:00 o'clock at night, at 180th Street and Fort Washington, where he met the appellant, and inside the car he delivered the kilogram to the appellant. (A...16 17).

Rodriguez further testified that the Appellant left $4,000.00 as part payment of the heroin with Prada, and that Ramiro Gonzalez was upset because that was very little money. That the Gonzalez said he was going to call the appellant in Miami, and walked out of the place called "El Gallo de Maron", and when he came back, instructed him to go to the apartment in 164th

Street, where he met a person named Willie and a woman gave him a paper bag with $14,000.00 (A...18-20).

Afterwards, pursuant to Ramiro Gonzalez's instructions he met again with the Appellant at Pradas Gas Station to deliver him one kilogram and a half of heroin, but because they were afraid of the place he met him outside a flower shop located at Broadway and 158th Street, where in the corner he met the appellant who had some flowers in his hand and went to his car that was parked below Broadway, where he delivered the heroin to the appellant. He stated that he did not remember how the appellant was dressed at the time. (A...21-22).

On cross examination among other things it was brought out that on a certain list of customers that Rodriguez gave the agents of D.E.A., Appellant's name did not appear. (A...23-28).

Rodriguez also admitted under cross-examination that appellant never gave him personally the $4,000.00, and the $14,000.00. (A...28), he testified to on direct (A...18-20).

He also admitted that the first time he met the Appellant was at the Alamac Bar (A...29) and that he

was introduced to the appellant by Ramiro Gonzalez, (A...29), whom the appellant said he knew from before (A...29) and that in the conversation that ensued there was no reference made to narcotics. (A...29).

He further admitted that he was shown many pictures during his direct examination of Prada's Gas Station and the 005 Bar at Broadway and 161st Street, and that the Appellant did not appear in any of them. (A...30).

Ramiro Gonzalez Infante, testified that in June 1968, he plead guilty to possession of a gun in Puerto Rico. That he failed to appear at time of sentencing, and that on October of 1970, he was arrested on the charges of conspiracy to distribute and distribution of narcotic drugs to federal undercover agents and that in that case he also jumped bail. (A...31). That in February 1972, he was re-arrested in connection with the same charges and after a plea of guilty, to two counts of conspiracy to distribute and distribution he was sentenced in the Southern District of New York to two terms of 10 years to run concurrently. (A...32).

He then testified that on March 1970, he had a conversation with Raul Ortega in reference to a shipment of 45 kilos of heroin in Miami, Florida. That

Ortega told him he needed him to get customers to buy the heroin and that he would give him a 50/50 participation in the business. (A-33-35).

He testified that subsequent thereto, he traveled to New York where he met Armando "El Chino", the appellant, thru Hugo el Americano, who told him the the Appellant (El Chino) had heard he had heroin and was interested in buying it. (A...36-37). According tc Gonzalez he met with Hugo El Americano and the Appellant at El Alamac Bar, where they discussed the sale of one kilogram of heroin at $20,000.00 in the presence of Miguel Rodriguez, who, agreed to deliver the kilogram. (A...36-40).
After Miguel Rodriguez delivered to the appellant, the heroin, Gonzalez testified that the Appellant made directly to him, the payment in two installments at his aunt's house at Broadway and 136th Street. (A...41).

Gonzalez further testified that he met the appellant again at his house, during a party in Hialeah, Florida, where he made arrangements to deliver through Miguel Rodriguez a kilogram of heroin to Hugo el Americano in New York. That after phone calls the said kilogram was delivered and a few days later Hugo El Americano paid him $14,000.00 at "El Gallo de Maron", in New York City. (A...42-49).

Gonzalez further testified that he met a few days later with the Appellant at his aunt's house in New York, at which time he agreed to deliver two (2) kilos to the Appellant the next day at Hugo El Americano's house, which he did. (A...49-52). Then seven or eight days later at his aunt's house, when Appellant came to pay him for the two kilos he agreed to deliver another kilo the next day at Hugo El Americano's house, which he did. (A...52-54). Finally, between "7,8 or 9 days later", he met appellant again at his aunt's house, where they arranged for the delivery of two more kilos of heroin at Broadway and 158th Street, where he met appellant dressed in white, with a large necklace and a bouquet of flowers in his hand. Miguel Rodriguez who was driving the car stopped and he (Gonzalez) rolled down the window and gave it to appellant who kept on walking. (A...54-57).

Manuel Noa testified that he used to stash heroin for Segundo Coronel, who, introduced him to Roberto Arenas and to Hovsep Caramian. (A...59-59) Coronel asked him to come to New York sometime in late January 1970, in reference to a shipment of heroin and to contact Roberto Arenas in New York, (A...60-61), which he did. He then met with Caramian and picked up 60 kilos of heroin at

Kennedy International Airport. He sold five (5) kilos, and returned the rest to Mr. Arenas. (A...62-67).

Roberto Arenas, called as a witness for the Government testified that about the 15th of February, 1970, Manuel Noa returned to him 55 kilos of heroin, and that he delivered it to Raul Ortega, pursuant to instructions from Segundo Coronel. That the next day, he met with Ortega and Caramian, and Caramian took ten (10) kilos from the 55 he had given to Ortega. (A...67-73).

The government rested and counsel for the appellant made a motion to dismiss the substantive count against the appellant on the grounds of duplicity, which the Court denied. (A...74). Counsel also moved to acquitt the appellant on the count of conspiracy on the grounds that the government at the most proved, that the appellant to be just a buyer not a conspirator, which Motion after extensive argument was denied by the Court. (A...75-80).

Charge:

The Court refused to charge multiple conspiracies in the manner requested by appellant's counsel, and this refusal was excepted to. (A...81, 82, 83, 84).

Verdict:

Appellant was found guilty of Count 1, (conspiracy) and Count 8 (purchase). (A...85).

Sentence:

The Appellant was sentenced to two (2) concurrent terms of eight (8) years. (A...86).

ARGUMENT

POINT I

THERE WAS INSUFFICIENT PROOF FROM WHICH A JURY COULD FIND BEYOND A REASONABLE DOUBT THAT APPELLANT ALVAREZ CONSPIRED TO IMPORT, SELL AND DISTRIBUTE HEROIN.

> Nobody is liable in conspiracy except for the fair impart of the concerted purpose or agreement he understands it. (United States v. Peoni, 100 F. 2d 401, 403 (2d Cir., 1938) (L. Hand, J.)

Even viewing the evidence against appellant in the light most favorable to the government, it demonstrated, at most, that appellant made four purchases of heroin from Gonzalez and Rodriguez. If the circumstances sorrounding the purchases made by the appellant are closely appraised, the logical and only inference that can be drawn is that appellant, was not aware, nor interested, nor had any stoke whatsoever nor knowledge of any on-going wide-ranging conspiracy as that one charged in the indictment; and therefore his conviction must be reversed*.

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*/ For the purpose of Point I, it will be assumed, that all of the evidence relating to Count 8, of the Indictment and the verdict was proper. It will, however, be contended in other points in this Brief that it was not so.

In its entirety, the evidence against the appellant Alvarez consisted of the testimony of two witnesses, Rodriguez and Gonzalez, both convicted narcotics offenders, who were offering their cooperation to the government, in the hope of having their sentences substantially reduced and not being prosecuted on other offenses. (It must be kept in mind that none of the alleged contraband was produced in Court).

According to Rodriguez's testimony, the appellant Alvarez made two (2) purchases of heroin from himself and Ramiro Gonzalez. According to Gonzalez in addition to these two (2) purchases, the appellant allegedly made two more purchases from him. This testimony is in itself not sufficient to make the appellant a conspirator within the test set forth in United States v. Borelli, 336 F. 2d 376, (2nd Cir. 1964), where at page 385 this Court said:

> "If in Judge Learned Hand's well known phrase, in order for a man to be held for joining others in a conspiracy, he must in some sense promote their venture himself, make it his own, (citing), it becomes essential to determine just what he is promoting and making his own".

There are many the decisions in which the above principle cited in Borelli (supra) from United States v. Falcone, 109 F2d 579 (2nd Cir. 1940) has been applied in conspiracy cases where as in the instant case, the evidence against the one accused of participating in a conspiracy such as the one at hand here consisted of an isolated purchase or delivery of narcotic. See: United States v. De Noia 421 F 2d 979, (2nd Cir. 1971); United States v. Reina 242 F2d 302 (2d Cir. 1957); United States v. Koch, 113 F2d 982, (2nd Cir. 1940); United States v. Stromberg, 268 F2d 256, (2nd Cir. 1959); United States v. Aviles, 274 F2d 179, (2d Cir. 1960).

We must of course distinguish that in the case at bar, it is alleged that the appellant in more than one instance, (four) purchased heroin from the witnesses. However, the principle enumciated in the above cases is applicable to the appellant in this case, since in effect it is not the number of times alone, nor the frequency and regularity, nor the amounts (substantial as they might be), that determines the participation in the conspiracy, but in fact all these factors when taken together and the attending circumstances that must be rationale.

For example, in United States v. Roch, supra, at 893, the Court stated that "...from the amount of the cocaine purchased, it can not be inferred that he knew of the conspiracy". Or in the case of United States v. Borelli supra, where the Court found that even though the purchases were frequent and of a substantial amount that it would suggest that he was a continuing customer, it in itself might not have sufficed to warrant submitting the question of Borelli participation to the jury.

Perhaps, the best summary of this point is found in United States v. Koch supra, where it is stated:

> "One of the many issues raised by the appellant on this appeal is whether or not the evidence was sufficient to prove that he knowingly joined the conspiracy to import and dispose of the narcotics. It has been strenuously argued that the utmost reach of the proof made him out to be only an isolated purchaser from the conspirators and not proved guilty of the crime charged in the indictment even though the purchase was unlawful. It is apparent that there is real difficulty in this respect. The amount of the cocaine purchased would, of course, indicate that it was taken not for personal consumption alone, but for resale. But the appellant was not a steady purchaser from the conspirators and so it cannot be inferred as it was in United States v. De Vasto, 2 Cir., 52 F.2d 26, 78 A.L.R. 36, that he knew of the conspiracy and was acting to further its ends rather than exclusively his own.

> Nor does the situation shown in evidence here correspond essentially to that in United States v. Bruno, 2 Cir., 105 F. 2d 921, where the appellants knew they were helping carry forward one or more phases of a conspiracy. Here for aught that appears the appellant had no knowledge whatever as to how Mauro had obtained the cocaine. No doubt he knew that Mauro's possession of it was unlawful and that was true also of the sale to and purchase by him. But there was nothing in the evidence to warrant a finding that he knew that Mauro was not, or had not previously been, acting alone in getting possession of the drug or how he may have obtained it.
>
> The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest. The appellant bought at a stated price and was under no obligation to Mauro, except to pay him that price. The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators. Dickerson v. United States, 8 Cir. 18 F. 2d 887."

It is then clear that even in the event that more than one purchase occured the inference cannot be drawn that Appellant had knowledge of a broader and wide ranging conspiracy unless, there is independent evidence to support such inference.

The testimony at the trial strongly rejects the idea that appellant had knowledge of the scope and objective of the conspiracy, charged in the indictment.

To begin with, the government itself in its opening statement concede the fact that the customers (the appellant) do not know the suppliers (A...6) and characterized the appellant as just a customer. (A...7).

Further, the conversations and dealings between the witnesses and the appellant, leading to and the consumation of the alleged purchases are devoid of any indication whatsoever (and for that matter the whole record itself) of any interest nor effort on the part of the appellant to further any of the objectives of the conspiracy charged. It is obvious, from the record that the only interest the appellant had was, if any, to buy heroin at a set price for his own sake and he could not care less, who, was the supplier, the importer nor the distributor nor he wanted to know it neither.

It must be noted that appellant did not know neither one of the government witnesses, until they first met was at El Alamac Bar (A...29, 36). and that relationship ceased to exist once there was no heroin. Further yet, the conversation were exclusively dealing with one transaction at the time, which falls within the realm

of United States v. Reina, supra, where it is asserted that this type of conduct is consistent with the position that the appellant was an independent peddler of narcotics."

That appellant made several purchases from both government witnesses in itself, is not enough evidence that he was involved in the conspiracy charged and absent of other independent evidence the conviction must be reversed and the count of conspiracy be dismissed as to the appellant.

POINT II

WHETHER OR NOT A SINGLE CONSPIRACY OR MULTIPLE CONSPIRACY WERE PROVEN ?

The indictment charged that the Appellant and others were member of a single conspiracy to import heroin, to conceal and distribute heroin. Appellant contends that in fact at least two (2) different and distinct conspiracies were proven and this constitute a fatal variance from the indictment.

The original conspiracy was made of what the government later decided to characterize as the "suppliers". In this group fall several co-conspirators that are not named in the indictment as defendants mainly because they became government witnesses, in this or/and in other cases, to wit: Roberto Arenas, Segundo Coronel, Manuel Noa, and Hovsep Caramian.

According to the testimony during the trial, Coronel sent his man Noa to New York from Miami, Florida, with instructions to see Arenas regarding a heroin shipment and to follow Arenas instructions. (A...60,61). He arrived in New York on February 2, 1970, and pursuant to his instructions reported to Arenas. (A...61). On the 5th day of February, Arenas called Noa and asked him to come and see him personally at which time he was

instructed to "escort Mr. Caramian to the place he would tell (him." (A...62). Noa and Caramian then picked up sixty (60) kilos of heroin at Kennedy International Airport and Noa then stashed it in two different apartments. (A...64-65).

Noa kept the heroin for three weeks and was able to sell 5 of the 60 kilos. At this point however, "(he)..noticed on the streets that (he was) being constantly followed... and (he) went to see Mr. Arenas to ... get rid of the merchandise." (A...65). Arenas told him at this point that "he didn't have any place to put it, because it did not belong to him." (A...65). The following day, he (Noa) saw Arenas and gave him the 55 kilos and told him, "Well, I wish you luck, because I'm leaving," and that is where the 60 kilos trip ends." (A...66).

It is patently clear from the foregoing that the original conspiracy ended right then and there, when the distributors Mr. Noa, decided to walk out of it because of his fear of being constantly followed. At this time, Arenas then finds a new distributor, Raul Ortega, who meets with him and Caramian who takes back 10 kilos and makes a new arrangement with Ortega, for the fast distribution of the rest of the shipment to wit: 45 kilos. (A...72).

Ortega in turn recruited Ramiro Gonzalez and offers him 50% of the business if he can get the customers and Gonzalez in turn recruted Miguel Rodriguez, and they set out to sell the heroin to the different defendants most of whom, as the record shows are independent narcotic peddlers, whom, have nothing to do with each other, among them the Appellant Alvarez, and little independent rings with no cross-over between them at all.

What this leads up to is, that in fact the Appellant Alvarez at the most, conspired with Rodriguez and Gonzalez and although he did not know him, nor had any idea of his existence with Ortega, in the alleged purchase of the six (6) kilograms, but not with the prior group - Noa, Caramian, Coronel and Arenas, and much less with the rest of the other defendants, who, were dealing independently with Rodriguez and Gonzalez, in the over all scheme designed to distribute the sixty (60) or the 45 kilos as the case might be. There being in fact, several conspiracies that the defendant must be acquitted.

To say that this whole series of events were a single and continuos conspiracies, is a gross oversimplification, which was flatly rejected in United States

v. Borelli supra. It is clear that the government rounded up a group of people, who, were involved in doing the same type of criminal acts and indicted all under the same conspiracy when in fact there were multiple conspiracies, Kotteakos v. United States, 328 U.S. 750.

Further yet, not only more than one conspiracy existed, but the Court failed to give the jury an adequate charge on multiple conspiracies, within the meaning of Kotteakos supra, and Borelli supra:

> What the evidence must show in order to establish that a conspiracy existed is that the members in some way or other, positively or tacitly, came to a mutual understanding to engage in a common unlawful agreement to violate Section 174 of the Federal Narcotics Laws which I have just described for you.
>
> All of the members need not have joined at the inception of the agreement, and I will discuss this point more fully with you later on. In determining whether or not there was such an unlawful agreement, you may judge the acts and conduct of each of the alleged conspirators as a whole and the reasonable inferences to be drawn from such evidence.
>
> An unlawful agreement may exist even though the individual conspirators may have done some acts in furtherance of the common unlawful purpose apart from, or unknown to, the others.

Proof of several separate and independent conspiracies is not proof of the single overall conspiracy charged in the indictment, unless one of those conspiracies proved is the single conspiracy charged in the indictment.

What you must determine as to this element is whether the conspiracy charged in the indictment existed between two or more of the alleged conspirators. If you find that no such conspiracy existed, then you must acquit all of the defendants on Count 1.

In determining whether the alleged conspiracy exists, you may consider what the evidence shows as to changes in personnel and activity. You may find a single conspiracy even though there were changes in personnel or activities, provided that you find that some of the conspirators continued throughout the life of the conspiracy and that the purpose of the conspiracy continued to be that charged in the indictment. The fact that the parties are not always identical does not mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall primary purpose and the same nucleus of participants, the conspiracy would be the same basic scheme even though in the course of its operation additional conspirators joined in and performed additional functions to carry out the scheme while others were no active or had terminated their relationship.

In addition the charge contained what is known as "the all or nothing charge" :

> What you must determine as to this element is whether the conspiracy charged in the indictment existed between two or more of the alleged conspirators. If you find that no such conspiracy existed, then you must acquit all of the defendants on Count 1.

Condenned in United States v. Borelli supra.

Wherefore, the Appellant respectfully contends that his conviction of the conspiracy count must be reversed and the Count dismissed because the proof established multiple conspiracies, which constitutes a fatal variance; and the charge given to the jury demand a reversal.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE GOVERNMENT TO USE A CHART IN IT'S OPENING STATEMENT.

At the very beginning of this trial, the prosecutor informed the Court that it intended to use a chart to help the presentation of its opening statement to the jury.

This was strenously objected by the defense counsels. However, the Court overruled the objection and allowed said chart's use.

The Appellant contends that this chart, staring at the jury before any evidence whatsoever is presented by the government with its pictorial value shown to the jury, at the outset of the trial by the prosecutor, labelling the Appellant as a "buyer of heroin" was inflamatory and prejudicial to such an extent that it could not be cured by any possible defense as it created upon the mind of the jurors the guilt of appellant, as indelibly as a tatoo, upon the skin. Thus depriving Appellant of a fair trial as guaranteed by the XIV Ammendment of the Constitution. This act being done with the full power and majesty of the Attorney for the United States, before a jury, which made it highly believable.

POINT IV

THE COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR DIRECTED VERDICT.

At the end of the government's case, Appellants attorney made a motion for a directed verdict, as to the substantive Count, on the grounds that the government had not proven its case against the Appellant, which motion was denied. (A...74)

Count Eight (8) of the Indictment charged the defendant as follows:

COUNT EIGHT

The Grand Jury further charges:

In or about the months of March and April, 1970, in the Southern District of New York, Armando Garcia-Alvarez, a/k/a Armando Alvarez, a/k/a Armando Garcia, a/k/a Andres Alvarez, a/k/a Joaquin Gonzalez, a/k/a "El Chino," the defendant, unlawfully, wilfully and knowlingly did receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit: approximately six kilograms of heroin, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any

narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and Dangerous Drugs finds to be necessary to provide for medical and legitimate uses only, is prohibited.

The proof presented at the trial, showed that this charge was the result of at least four of five different purchases by the Appellant from Ramiro Gonzalez, each being an independent transaction.

Not only was the proof offered at trial at variance with the charge itself, but in addition it was presented in such a confused and contradictory manner, that the jury could not have without a reasonable doubt find the defendant guilty.

For Instance:

A.- Rodriguez claimed, that him and Gonzalez met the Appellant at the Alamac Bar for the first time, but that there was no discussion of narcotics. (A...14).

A-1.- Gonzalez stated that at that same meeting, him and Rodriguez discussed with the defendant-appellant the purchase of one (1) kilo of heroin, price and place of distribution.

B.- Rodriguez claimed that appellant paid thru Prada Four Thousand ($4,000.00) Dollars, to him as part payment for said kilo and later received from"Willie" $14,000.00, more. (A...18-20.)

B-1.- Gonzalez testified that the said payment was made by the appellant to him, personally at his aunt's house at Broadway and 136th Street, and for the amount of $20,000.00. (A...41.)

C.- Rodriguez claimed that he made by himself a delivery of one and a half (1 1/2) kilos of heroin to Appellant outside his car in the corner of flower shop at Broadway and 158th Street, (A...21-22.)

C-1.- Gonzalez in turn testified, that he was the one that made the delivery from the car which Rodriguez was driving and he clearly remembers hos appellant was dressed that day. (A... 54-57.)

It is appellant's contention that from the above irreconcilable differences, in the testimony of the government witnesses, the jury could not find the defendant guilty of "receiving, buying, selling, concealing or facilitating, the transportation "of six (6) kilograms of heroin as charged in the indictment as the testimony shows that there is an absolute conflict as to where the agreement was made, the price paid for and more important yet, both claim to have made the same deliveries and accepted different sums of moneys at the same time.

Further yet, these irreconcialable differences, this "fight" among the witnesses to take credit for alleged deliveries and collection of payments had to be known by the United States Attorney, before trial, either during the grand jury's testimony of the witnesse and/or during her discussion of their testimony in the preparation for trial, and it was not corrected by a superseeding indictment, nor was it made known to defense counsel before trial, all in violation of Defendants rights under the Fourteenth Amendment

In summary, it all adds up to the presentation of considerable amount of testimony completely contradictory which can not substantiate the charge.

POINT V

THE TRIAL COURT'S CHARGE CONTAINED REVERSIBLE ERROR.

A.- The Marshaling of the Evidence.

The Trial Court in its charge to the jury, marshaled the evidence to which counsel for the appellant Alvarez excepted to. (A...82-A.)

It is Appellant's contention that the marshaling of the evidence was totally prejudicial as it included the testimony that was presented by the witnesses Rodriguez and Gonzalez against the Appellant, but totally ignored the serious contradiction in their testimony.

This type of marshaling coming from the bench at the end of the trial court have but one effect in the mind of the jury: the guilt of the Appellant.

CERTIFICATE OF SERVICE

I, GINO P. NEGRETTI, hereby certify that a true and correct copy of the Brief on Appeal on Appellant APMANDO ALVAREZ, was on this 11th day of July, 1974, mailed to UNITED STATES ATTORNEYS OFFICE, FOR THE SOUTHERN DISTRICT OF NEW YORK, UNITED STATES COURTHOUSE, FOLEY SQUARE, NEW YORK, NEW YORK.

Gino P. Negretti

GINO P. NEGRETTI,

CERTIFICATE OF SERVICE

ATTORNEYS OF RECORD

I, GINO P. NEGRETTI, hereby certify, that on this 10th day of July, 1974, a true and correct copy of Brief of Appellant ARMANDO ALVAREZ, was mailed to the below listed parties, at their respective office addresses:

HARVEY J. MICHELMAN, ESQ.
Attorney for Defendant Ortega-Alvarez

HUDSON REID, ESQ.
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